* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

December 6, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 18, 2004

Case Number: TSO-0086

This Decision concerns the eligibility of XXXXXXXXXX (the individual) to hold an access authorization[1] under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's access authorization was suspended by the Manager of a Department of Energy (DOE) local office pursuant to the provisions of Part 710. Based on the record before me, I am of the opinion that the individual's access authorization should not be restored.

I. *Background*

The individual is an employee of a contractor at a DOE facility. After the individual was arrested for Driving Under the Influence (DUI) in January 2003, the DOE local office conducted a Personnel Security Interview (PSI) with the individual on March 19, 2003. *See* DOE Exhibit 7. Because the security concern remained unresolved after the PSI, the DOE local office requested that the individual be interviewed by a DOE consultant psychiatrist. The psychiatrist interviewed the individual on June 16, 2003, and thereafter issued an evaluation to the DOE. *See* DOE Exhibit 8. The DOE local office ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to the individual. Accordingly, the DOE local office suspended the individual's access authorization, and proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the

[1] Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

possession of the DOE created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the DOE local office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), the individual and the DOE consultant psychiatrist testified. The DOE Counsel submitted exhibits prior to the hearing. I closed the record upon receiving the transcript of the hearing on June 29, 2004.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization. I have also considered the evidence that mitigates that concern. And I conclude, based on the evidence before me and for the reasons explained below, that the security concern has not been resolved.

II. *Analysis*

A. *The Basis for the DOE's Security Concern*

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual "has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist as alcohol dependent or as suffering from alcohol abuse." *See* 10 C.F.R. § 710.8(j). The statement was based on the individual's January 2003 DUI, his description of his alcohol use at the PSI, as well as the June 16, 2003 diagnosis by the DOE consultant psychiatrist that the individual suffered from "alcohol abuse, ongoing" with "no evidence of rehabilitation or reformation." DOE Exhibit 8.[2]

[2] The DOE psychiatrist also diagnosed the individual with "Possible Depressive Disorder NOS [not otherwise specified.]" DOE Exhibit 8. The psychiatrist noted, "At this time I see no evidence by his report of significant mental illness or condition, however he is taking two different antidepressant medications and an anxialytic medication." *Id.* Because the DOE cites only 10 C.F.R. § 710.8(j), which relates exclusively to the use of alcohol, as the basis for its concern, this opinion will not consider any security concern that may relate to the individual's possible depression. For

In requesting a hearing, the individual does not dispute the facts surrounding his DUI. He contends, however, that he has modified his drinking behavior, and has shown evidence of rehabilitation and reformation. DOE Exhibit 5.

1. *Whether the Individual Suffers from Alcohol Abuse*

At the hearing, the DOE consultant psychiatrist explained the general basis for a diagnosis of alcohol abuse. "Alcohol abuse, per se, is diagnosed—diagnosis is made when alcohol is used with such extent and regularity that is causes dysfunction, whether that's dysfunction within personal relationships, work relationships, legal problems." Transcript of Personnel Security Hearing ("Tr.") at 28. In his evaluation of the individual, the psychiatrist found "a history of significant alcohol use resulting in his arrest for DUI," noting that "the patient reports drinking on the average 3-4 drinks per day . . . ." DOE Exhibit 8. The psychiatrist testified at the hearing that, given the level and regularity of the individual's alcohol use, one legal problem such as the individual's DUI would be sufficient to "trigger the diagnosis" of alcohol abuse. Tr. at 29.

The individual does not dispute the diagnosis of alcohol abuse, as such, but did take issue with the psychiatrist's description of his average daily use of alcohol. The DOE psychiatrist "said I had said an average of three or four. . . . And I had told [the DOE psychiatrist] that I drank probably on the average of three a day rather than an average of three to four, . . ." Tr. at 18. The individual points out that in the PSI he stated that the number of drinks he consumes "probably averages out to three" per day. DOE Exhibit 7 at 16.

However, this relatively minor factual dispute does not undermine the psychiatrist's diagnosis. I note that, after being corrected at the hearing by the individual regarding what he claimed was his level of drinking, the DOE psychiatrist did not back away from his diagnosis. Tr. at 18, 29.

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the same reason, I will not consider the statement in the psychiatrist's evaluation that the individual "reported a lack of knowledge as to why the medications were prescribed." *Id*. The individual strongly disagrees with this characterization, but was not allowed access to documents in the possession of the DOE psychiatrist that may have supported his position. There is no dispute, however, that the individual was taking antidepressant medications, and this is a relevant point as it relates to his use of alcohol, as I discuss below.

Moreover, the "trigger" of the diagnosis, the individual's DUI, is not disputed. Considering all of this, I accept as accurate the DOE consultant psychiatrist's diagnosis of alcohol abuse.

2. *Whether the Individual Has Been a User of Alcohol Habitually to Excess*

The term "user of alcohol habitually to excess" is not a term of art used in psychiatry or substance abuse treatment. Tr. at 45. As the DOE psychiatrist testified,

> Well, the "habitually" and to "excess" is a DOE definition. That's not a medical definition. You know, what point is considered excessive, well, in medical terms and in scientific terms, we look at dysfunction. If a person does something that results in dysfunction, then we have a problem and something that needs to be addressed in some way, . . .

Indeed, the term is not defined in the Part 710 regulations, even though it is only in the context of personnel security that the term is regularly used. One DOE hearing officer has opined that "[a]rguably, drinking to the point where one's judgment is impaired is 'excessive,' since the DOE must depend on the intact judgment of a clearance holder at all times." *Personnel Security Hearing*, Case No. VSO-0535, 28 DOE ¶ 82,874 (2002).

In the present case, whether the focus is on dysfunction or impairment of judgment, there is evidence that the individual's past drinking has been excessive. In the PSI, the individual noted two circumstances in his marriage when his wife (from whom he has recently divorced), complained about his drinking.

Q. OK. Has anyone whether it be your wife of one of your children or maybe a brother, sister or parent, close friend, has anyone ever suggested to you that maybe you're . . . developing or having a problem with alcohol?

A. Well, back when I was drinking beer, we would go to motocross races and stuff. And she would get upset with me.

DOE Exhibit 7 at 18. The individual, also in the PSI, described a pattern of stopping on the way home from work, about three times a week, to have a "couple of drinks." See *Id.* at 11-18.

Q. OK. Did [your wife] ever reference the fact that you were drinking when you came home?

A. Yeah, she would say, "Why did you stop off and, and drink?"

Q. OK.

A. You know, "we need to talk about this or we need to do this or do that."

Id. at 18. In my opinion, this type of friction between husband and wife, related to alcohol use, qualifies as dysfunction.

There are also in the PSI admissions by the individual that he drank to levels that could impair his judgment. In the context of describing the times he would stop on the way home from work, the individual stated,

> [Y]ou know, if I was going to eat or something I might end up drinking three or four.
>
> Q. And . . . three or four drinks, would that make you intoxicated?
>
> A. Uh, I didn't think so, you know, at the time, but according to, according to the [DUI] classes again that would have put me at a .08. . . .
>
> . . . .
>
> A. I would be, uh, impaired as the rule goes, as the law says. But as far as me feeling like I was intoxicated, no, I mean I, uh, I might feel a little, uh, a, a buzz or something like that, a little bit of, I'd start feeling it, but I didn't feel like I, I mean I wasn't wobbling around or, or anything like that, or slurred speech or anything, but . . .
>
> . . . .
>
> A. I didn't feel like I was impaired.
>
> Q. OK
>
> A. But as it turns out from a legal stand point, may, I could have . . .

Id. at 12-13. In sum, the individual's past drinking behavior resulted in a degree of dysfunction in his marital relationship, and probably also regularly impaired his judgment, at least to some extent. To his credit, the individual testified that, since the January 2003 DUI, he no longer stops on his way home to drink. Tr. at 30-31. Nonetheless, the evidence supports a conclusion that the individual has in the past used alcohol habitually to excess.

B. ***Whether the Security Concerns Have Been Resolved***

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). "In resolving a question concerning an individual's eligibility for access authorization," I must consider

> the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

10 C.F.R. § 710.7(c).

Under the Part 710 regulations, the Hearing Officer is directed to make a predictive assessment as to whether restoring access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In the present case, that assessment has to do with the individual's future relationship with alcohol. Despite some changes in the individual's drinking patterns, I am concerned that in the future he may use alcohol in a manner that will impair his judgment. Thus, I find that the security concerns at issue have not been sufficiently resolved.

First, it is not at all clear that the concern in this case, as it relates to the diagnosis of alcohol abuse, has been resolved. When the DOE psychiatrist wrote his evaluation, he found that the individual "continues . . . drinking on a nightly basis. With this in mind, this would indicate that he is using alcohol habitually and at this point has shown no evidence of rehabilitation or reformation." DOE Exhibit 8. The individual testified at the hearing that he has since modified his pattern of drinking.

> [W]hen I had seen this habitual word in [the February 18, 2004 Notification Letter], it made me feel extremely – I was very unhappy to have heard that word. So since that time, I've decided, you know . . . , I don't want to be put into a category of a habitual drinker.
>
> . . . .
>
> So now my typical pattern is Friday and Saturday. I will drink a couple of drinks perhaps on Saturday night, maybe three, maybe four watching movies, but I still stick with that pattern. But during the week is not my routine.

Tr. at 24.

At the time of the hearing, May 28, 2004, this new pattern had been sustained during the 14 weeks since the date of the Notification Letter, February 18, 2004. I asked the DOE psychiatrist, "How long would he have to demonstrate a change in his pattern of behavior before you would be comfortable in terms of saying that he's mitigated the concern, and his chances of having problems in the future are lowered by that?" The psychiatrist responded that it was "a judgment call as far as that goes. From a purely scientific standpoint, it takes eight weeks to form a habit. It takes roughly

three times that to break one. Based on that rule of thumb, 24 weeks would justify or would indicate a broken habit." Tr. at 32.

Because of the individual's change of drinking pattern, the DOE psychiatrist testified regarding his diagnosis of alcohol abuse, "At this point, it would probably be considered provisional, meaning that there had been situations in which he had met the criteria in the recent past, but at this point, there has been a change." Tr. at 49. Yet, the DOE psychiatrist also testified that a change in behavior must be "persistent and ongoing" for it to be reliably predictive of future behavior. Tr. at 30. Applying the psychiatrist's 24 week "rule of thumb" in this case, it is clear that not enough time had passed as of the time of the hearing to allow for a favorable prognosis.

Moreover, aside from the testimony of the DOE psychiatrist, I find unresolved concerns stemming from the fact the individual has in the past used alcohol habitually to excess. I note here that, under the Part 710 regulations, I can reach conclusions as to these concerns independent of any expert opinion. *Personnel Security Review*, Case No. VSA-0281, 27 DOE ¶ 83,030 (2000) ("10 C.F.R. 710.8(j) . . . does not require the particular finding that an individual has 'been, or is, a user of alcohol habitually to excess' to be supported by an expert opinion.").

First, the testimony of the individual does not reflect an acknowledgment that there has been an ongoing problem with his use of alcohol. For example, the individual appears to have changed his habit of daily drinking not because he thought his habit was an indicator of an actual problem, but rather because he did not want to be labeled or "put into a category of a habitual drinker." Tr. at 24.

Along with this apparent denial of a problem is the tendency of the individual to minimize the extent of his drinking in order to rationalize his habit as being "for medical purposes." Tr. at 18. When not justifying his drinking for this purpose, the individual readily admitted to having, on average, three drinks per day. *See, e.g., Id.;* DOE Exhibit 7 at 16; DOE Exhibit 4 at 1. However, when describing his drinking as being "for medical purposes," the quantity became "two drinks" per evening. Tr. at 18; DOE Exhibit 4 at 1.

The notion that the individual was drinking daily "for medical purposes" is simply not credible. With his request for a hearing, the individual submitted an article from the WebMD website, stating that, "Studies have shown men and women, middle-aged or older who have one or two drinks per day have lower death rates from heart disease than both teetotalers and those who drink three drinks or more a day." Of course, this information provides no justification for having an average of three drinks per day. My concern is not so much that the individual is stretching the facts to justify his past drinking habit to the DOE, but that he is doing so to justify it to himself. Because the individual does not see his old habit as having been a bad thing, but instead views it as having been good for him, I believe it will be that much easier for him to return to his past drinking patterns.

Finally, the individual testified that he continues to use alcohol despite that fact that he is taking prescription drugs for the treatment of depression. The DOE psychiatrist testified as to the inadvisability of this practice. Tr. at 17. The individual testified that his doctor never advised him

that using both alcohol and antidepressants would be a problem. However, he did acknowledge that his antidepressants come with labels warning against the use of alcohol. Tr. at 35. More telling is that, knowing of the problems of the interaction of these drugs, the individual still does not intend to stop using alcohol. Instead, the individual testified, "What I was hoping to do is once I get through this situation, I was going to go back to my doctor and ask to discontinue the antidepressant, and we have to go off it slowly." Tr. at 36. I find it troubling that the individual had apparently not considered the more obvious and, at least in the short term, more rational option of simply stopping his use of alcohol.

Considering all of the above, I believe that the risk of the individual relapsing, i.e., returning to drinking to levels that impair his judgment, is too high at this time. I am concerned that the individual does not yet fully understand that he has a problematic history with alcohol. While it is by no means certain that the individual's use of alcohol will present a security risk, if I am to err in making this predictive assessment, I must err on the side of national security. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"). With this in mind, I cannot recommend that the individual's clearance be restored at this time.

III. *Conclusion*

Upon consideration of the record in this case, I agree with the DOE that there is evidence that raises a substantial doubt regarding his eligibility for a security clearance, and I do not find sufficient evidence in the record that resolves this doubt. Therefore, because I cannot conclude that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest, the individual's access authorization should not be restored. 10 C.F.R. § 710.27(a). The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: December 6, 2004